

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES S. GARNETT,

CASE NO. 2:05-CV-01438-MJP

Petitioner,

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

V.

RICHARD MORGAN,

### Respondent.

## I. Introduction

An evidentiary hearing was held on January 24, 2011. Petitioner Garnett was represented by Assistant Public Defender Jennifer Wellman. Respondent was represented by Senior Counsel to the Attorney General Paul Weisser.

## II. Findings of Fact

1. Petitioner James S. Garnett is a Washington State prisoner who was convicted by jury verdict in Skagit County Superior Court of one count of aggravated first degree murder for the September 14, 1999 murder of Dino Dan Diorio.

1       2. The trial in Petitioner's case, State v. Garnett, Skagit County Superior Court No. 99-1-  
2       00636-3, began on August 16, 2000.

3       3. In October 1999, before the victim's body was found, the victim's mother Meg Diorio,  
4       contacted the Carole Sund/Carrington Memorial Reward Foundations ("the Foundation").  
5       The Foundation, through its Executive Director Kim Peterson, agreed to post a \$5000  
6       reward for information leading to Dino Dan Diorio's safe return or the arrest of the  
7       person or persons responsible for his murder.

8       4. The reward offer was announced by a representative of the Foundation at a press  
9       conference in Mount Vernon, Washington on October 27, 1999. The reward offer was  
10       mentioned in an article in the local newspaper that same day and was mentioned in a  
11       police report filed by Sergeant Wayne Dowhaniuk of the Mount Vernon Police  
12       Department, who also attended the press conference.

13       5. Sergeant Dowhaniuk prepared a missing person flyer regarding Diorio's disappearance  
14       and referred to the \$5000 reward. The flyer was distributed within Skagit County and  
15       later admitted as State's Exhibit 23 at Petitioner's trial.

16       6. One of the State's witnesses at Petitioner's trial was Kristine Stafford, now known as  
17       Kristine Anderson.

18       7. Anderson knew Petitioner's wife, Kymberly Garnett, from the time the two women were  
19       detained in Skagit County Jail together in November 1999. She did not know Petitioner,  
20       nor was she a witness to the murder of Diorio.

21       8. After the two women were released from jail, they began a drug binge. Kymberly  
22       Garnett privately made certain incriminating statements to Anderson about the murder.  
23       Anderson contacted the Skagit County Prosecuting Attorney, Thomas Verge, on  
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1      December 15, 1999, to report what she had heard. Verge contacted the law enforcement  
2      officer investigating the murder, who then contacted Anderson.

3      9. Anderson agreed to wear a hidden “body wire” audio recording device during her future  
4      meetings with Kymberly Garnett. Anderson met with Kymberly Garnett while wearing  
5      the body wire on December 16, 17, and 21, 1999, and several hours of the women’s  
6      conversations were recorded. During the meetings, Anderson prompted Kymberly  
7      Garnett to talk about the murder while consuming methamphetamine and heroin.

8      10. In the tape recordings, Kymberly Garnett never “confessed” to the murder nor did she  
9      ever state that Garnett was guilty. Rather, she made ambiguous statements in response to  
10     Anderson’s questions that suggested she and Petitioner were involved in the crime.

11     11. On November 19, 1999, Kymberly Garnett was also charged with Diorio’s murder. She  
12     was tried separately after Petitioner’s August 2000 trial.

13     12. The Skagit County Prosecuting Attorney, through law enforcement, used Anderson to  
14     listen to the tapes and edit transcripts for use at trial.

15     13. Anderson was not aware of the Foundation’s reward offer during the times she was  
16     wearing the body wire, listening to the recordings or editing the transcripts of the  
17     recordings.

18     14. Skagit County Prosecuting Attorney Thomas Verge and Deputy Prosecuting Attorney  
19     Karen Calhoun prosecuted Petitioner’s case.

20     15. Once a reward is posted, the Foundation defers to law enforcement regarding who, in any  
21     given case, should receive a reward. This practice was followed in State v. James  
22     Garnett.

1 16. Law enforcement kept the Foundation apprised of the Diorio investigation and the  
2 prosecution of James and Kymberly Garnett.

3 17. The state met with Anderson in preparation for Petitioner's trial on several occasions to  
4 prepare her testimony and to ensure that she remained drug-free.

5 18. The state arranged for Anderson's warrants to be quashed and provided her transportation  
6 from her home in Montana where she was in a troubled marriage. She was in constant  
7 contact with law enforcement and the prosecutors' staff.

8 19. Prior to her testimony, Anderson was prepared by the prosecutors. During a preparatory  
9 session, she was told of the Foundation reward money.

10 20. Anderson understood that she needed the prosecutors' recommendation to receive the  
11 \$5000 reward and that the recommendation was dependent upon her continued  
12 cooperation and testimony at trial. The money was important to Anderson and  
13 represented a significant sum to her.

14 21. The prosecutors believed that Anderson's testimony was necessary to their case.

15 22. Petitioner's trial counsel were never told of the reward, either prior to or during their  
16 interview of Anderson, prior to her trial testimony, or at any time during trial.

17 23. On March 7, 2000, the defense filed an Omnibus Application in which it requested, *inter*  
18 *alia*, material or information discoverable under Brady v. Maryland, 373 U.S. 83 (1963),  
19 and any information as to whether a state witness has been promised or granted immunity  
20 or provided any other consideration.

21 24. On April 20, 2000, the trial court granted that request and specifically directed the state  
22 to, *inter alia*, "disclose evidence in plaintiff's position, favorable to defendant on the  
23 issue of guilt."

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1 25. On August 23, 2000, during the second week of Petitioner's trial, Petitioner moved to  
2 dismiss the case pursuant to Wash. Cr.R. 8.3(b) and the state and federal constitutions.  
3 The motion was based in part upon the state's failure to disclose, before the August 21,  
4 2000 defense interview of Anderson, the extent of Anderson's drug use during the  
5 investigation.

6 26. At no time prior to or during trial did the prosecution inform the defense that the state had  
7 promised to consider "recommending" Anderson for the reward.

8 27. During Anderson's meetings with the prosecutors in preparation for her testimony, she  
9 was given instructions about testifying. She was told not to volunteer information unless  
10 specifically asked about it. Anderson interpreted this to mean that she was not to talk  
11 about any reward recommendation unless specifically asked.

12 28. The defense first met with Anderson in person on August 21, 2000, nearly one week after  
13 the trial against Petitioner had begun. During their pre-testimony interview of Anderson,  
14 defense counsel asked what the prosecutors did for her on her warrants. The prosecutor  
15 interrupted and answered on Anderson's behalf, saying only that the state had quashed a  
16 warrant out of Snohomish and a Burlington warrant.

17 29. The defense did not find out about the recommendation for the reward, the transport from  
18 Montana or the State's efforts to keep Anderson clean and sober.

19 30. Anderson was subpoenaed as a state's witness for Petitioner's trial and testified on  
20 August 24, 2000.

21 31. Two excerpts from Anderson's body wire recordings were ruled admissible at  
22 Petitioner's trial. In one of those excerpts, Kymberly Garnett described her disposing of  
23 Petitioner's bloody clothing on the night of the murder. In the second excerpt, Kymberly  
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1 Garnett referred to her and her husband's theft of a stun gun from a sporting goods store  
2 in Bellingham, Washington, and suggested the stun gun was used during the murder of  
3 Diorio.

4 32. In her direct testimony, Anderson described her meetings and conversations with  
5 Kymberly Garnett in November and December 1999. She had no first-hand knowledge  
6 of Petitioner's crime. The only evidence Anderson provided that indirectly incriminated  
7 Petitioner was contained on the body wire tapes.

8 33. The two excerpts from Anderson's taped conversations with Kymberly Garnett that had  
9 been ruled admissible were played for the jury during Anderson's testimony, and  
10 transcripts of those excerpts were provided to the jury during the playing of the tapes.  
11 Anderson worked with law enforcement to ensure the accuracy of the transcripts.

12 34. Anderson offered no direct testimony or knowledge about the murder at trial. Her  
13 testimony was limited to the description of her contacts with Kymberly Garnett, her  
14 wearing of the body wire, and the authentication of the tapes and transcripts.

15 35. The police testified at trial that none of the witnesses "asked" for the reward. Also, the  
16 prosecutor asked Anderson what she had asked of the state. Finally, the prosecutor in  
17 closing argument claimed that Anderson did not get anything.

18 36. Petitioner's trial concluded with the return of the jury's verdict on August 31, 2000.  
19 Petitioner was sentenced to life imprisonment without the possibility of parole on  
20 September 21, 2000.

21 37. After Petitioner's conviction, on October 30, 2000, Calhoun drafted a letter  
22 recommending that Anderson receive the reward money. The letter apparently was not  
23 sent to the Foundation at that time, however, in the letter Calhoun expressed that she did  
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1 not know whether the state would have been successful in convicting the Garnetts  
2 without Anderson.

3 38. Before further steps were taken with respect to the reward, Anderson first testified  
4 Kymberly Garnett's trials, the first of which ended in a hung jury and the second of  
5 which ended in a conviction in August 2001.

6 39. On September 12, 2001, Verge met with Anderson to discuss the Foundation's reward.  
7 At that time Verge had not made up his mind about whether to recommend Anderson  
8 receive the reward, and he told Anderson that he would advise her of the final  
9 recommendation.

10 40. On October 19, 2001, Verge, Dowhaniuk, and a representation from the Skagit County  
11 Sheriff's Office signed a joint letter to the Foundation recommending that Anderson  
12 receive the reward. They further recommended, however, that a portion of the reward be  
13 used to satisfy Anderson's legal financial obligations from several of her criminal cases.

14 41. The Foundation agreed with those recommendations. A total of \$2097.92 was paid to  
15 satisfy Anderson's legal financial obligations. On November 27, 2001, Anderson  
16 received a check for the remainder of the reward in the amount of \$2902.08.

17 42. Kymberly Garnett's conviction was later overturned on appeal and her third trial resulted  
18 in a hung jury.

19 **III Analysis**

20 43. In Brady v. Maryland, the Supreme Court held "that the suppression by the prosecution  
21 of evidence favorable to an accused upon request violates due process where the evidence  
22 is material either to guilt or to punishment, irrespective of the good faith or bad faith of  
23 the prosecution." 373 U.S. 83, 87 (1963). Evidence is "material" if there is a reasonable  
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1 probability that, had the evidence been disclosed to the defense, the result of the  
 2 proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682  
 3 (1985). To establish materiality, the “question is not whether the defendant would more  
 4 likely than not have received a different verdict with the evidence, but whether in its  
 5 absence he received a fair trial.” Kyles v. Whitley, 514 U.S. 419, 434 (1995). “A  
 6 ‘reasonable probability’ of a different result is [ ] shown when the government’s  
 7 evidentiary suppression ‘undermines confidence in the outcome of trial.’” Id.

8 44. When the prosecution fails to disclose a promise made to a witness, courts assess whether  
 9 the credibility of a witness would have been important to the juror’s verdict. Materiality  
 10 is lacking when the tainted witness’s testimony is duplicative or the witness was  
 11 sufficiently impeached on other grounds. In Hovey v. Ayers, for example, the  
 12 prosecution’s failure to disclose an “unspoken agreement” with a witness was not  
 13 material because the substance of witness’s testimony was also offered through another  
 14 witness. 458 F.3d 892 (9<sup>th</sup> Cir. 2006). In Akrawi v. Booker, the prosecution’s failure to  
 15 disclose a “mutual understanding” to reduce a witness’s charges was not material  
 16 because, even without the disclosure, defense counsel sufficiently hinted at the likelihood  
 17 of a deal at trial. 572 F.3d 252, 262 (6<sup>th</sup> Cir. 2009).

18 45. But courts have found a Brady violation when the witness’s testimony is central to the  
 19 prosecution and assessment of the witness’s credibility is crucial to the trial outcome. In  
 20 Singh v. Prunty, the prosecution’s failure to disclose benefits a jailhouse informant  
 21 received was material. 142 F.3d 1157 (9<sup>th</sup> Cir. 1998). In Singh, the prosecution’s murder-  
 22 for-hire theory was based on the informant testifying that defendant had tried to hire him  
 23 for the murder. Assessment of the informant’s credibility was, therefore, important.

1     46. In Bagley v. Lumpkin, the court held the compensation two witnesses received before  
 2     and after trial was material and subject to Brady disclosure. 798 F.2d 1297 (9<sup>th</sup> Cir.  
 3     1986). In Bagley, defense counsel did not question the two witnesses for bias or self-  
 4     interest and the two witnesses provided the only evidence for one of the charges. Id. at  
 5     1302. Corroborating tapes of the witnesses' conversations with defense were  
 6     inadmissible. Id. Likewise, in Silva v. Brown, the court held failure to disclose an  
 7     agreement that witness would not submit to a psychiatric evaluation was material because  
 8     witness's testimony was the only evidence detailing how the murder took place and by  
 9     whom. 416 F.3d 980, 989 (9<sup>th</sup> Cir. 2005).

10    47. Here, assessment of Anderson's credibility was not crucial to the trial outcome. Unlike  
 11    Bagley or Silva, Anderson did not testify as to who killed Diorio or how. Unlike Singh,  
 12    Anderson's testimony was not necessary to support a prosecutorial theory. The most  
 13    damning part of Anderson's testimony was the introduction of excerpts of the recorded  
 14    "body wire" conversations where Kymberly Garnett discussed the "zapper" theft and the  
 15    disposal of Mr. Garnett's bloody clothes and the body wire excerpts offered were ruled  
 16    admissible. The government's case did not rely on the jury finding Anderson to be a  
 17    credible witness; the contents of the body wire excerpts are independent of any promise  
 18    of reward. The jury had the opportunity to listen to the tapes themselves. The tape  
 19    recordings were made long before any promise of a reward was known to the witness and  
 20    could not have influenced her contact with Kymberly Garnett. As in Hovey, the  
 21    substance of Anderson's testimony would have been offered to the jury regardless of the  
 22    reward's disclosure.

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#### **IV. Conclusions of Law**

48. The Court has jurisdiction over the parties and over the issues presented.
49. Petitioner bears the burden of proving the facts underlying each element of his claim of constitutional error by a preponderance of the evidence.
50. The Petitioner has failed to establish the materiality of the information kept from the defense. The prosecution led Anderson to believe that the recommendation hinged on her cooperation and testimony and, if she complied, they would recommend the reward. This information should have been revealed to the defense but its withholding does not rise to a constitutional violation. Anderson's receipt of the reward was not material to the outcome of the case because it does not undermine confidence in the outcome of the trial.
51. The Court denies the petitioner for habeas relief.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 1st day of March, 2011.

  
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Marsha J. Pechman  
United States District Judge